Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLE

No. 80-188

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

RUDOLPH KONSCOL,

Petitioner,

vs.

THE STATE OF GEORGIA EX REL FRANCES KONSCOL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

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QUESTIONS PRESENTED

(1) Whether the Supreme Court of Georgia and the Superior Courts of Georgia nullify the decision of this Court in *Orr* v. *Orr* 440 U. S. 268; 59 LE 2d 306; 99 S ct 1102, by requiring that the equal protection clause of the Fourteenth Amendment defenses be raised and decided in the original alimony proceeding and that the defense of unlawful gender classification cannot be raised in a contempt proceeding?

(2) Whether a person ordered to pay alimony pursuant to a Uniform Reciprocal Enforcement of Support Act, based upon the law of New Jersey and both the New Jersey and Georgia Act being subject to an equal protection clause attach because of gender classification, may defend a contempt proceeding and raise the unlawful gender classification defense?

(3) Is an Equal Protection clause of the Fourteenth Amendement defense available in a contempt proceeding to enforce alimony awarded under statutes subject to a gender attack?

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No.

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VS.

THE STATE OF GEORGIA EX REL FRANCES KONSCOL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

The Petitioner Rudolph Konscol respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of The State of Georgia entered in this proceeding on May 7, 1980.

OPINION

The opinion of the Supreme Court of Georgia, not yet reported, appears in the Appendix hereto. The case being Case No. 36361 and having been decided by that Court on May 7, 1980.

JURISDICTION

The Judgment of the Supreme Court of the State of Georgia was entered on May 7, 1980, and this petition for certiorari was filed within 90 days of that date. This Courts jurisdiction is involved under 28 U.S.C. §1257 (3).

QUESTIONS PRESENTED

(1) Whether the Supreme Court of Georgia and the Superior Courts of Georgia nullify the decision of this Court in *Orr* v. *Orr* 440 U. S. 268; 59 LE 2d 306; 99 S ct 1102, by requiring that the equal protection clause of the Fourteenth Amendment defenses be raised and decided in the original alimony proceeding and that the defense of unlawful gender classification cannot be raised in a contempt proceeding?

(2) Whether a person ordered to pay alimony pursuant to a Uniform Reciprocal Enforcement of Support Act, based upon the law of New Jersey and both the New Jersey and Georgia Act being subject to an equal protection clause attach because of gender classification, may defend a contempt proceeding and raise the unlawful gender classification defense?

(3) Is an Equal Protection clause of the Fourteenth Amendement defense available in a contempt proceeding to enforce alimony awarded under statutes subject to a gender attack?

STATUTORY PROVISIONS INVOLVED

(1) Equal Protection Clause of Fourteenth Amendment

(2) New Jersey Revised Statutes Title 2 A §23

(3) Ga Laws 1958, page 34 - Ga. Code Ann Chapter 99-9A

STATEMENT OF CASE

Rudolph Konscol and Frances Konscol were divorced by a decree of the Superior Court of New Jersey, Chancery Division, Union County on June 26, 1974. Thereafter, Frances Konscol filed a petition in the Superior Court of Gwinnett County Georgia seeking alimony as Support under the Georgia Uniform Reciprocal Enforcement of Support Act (URESA). Both the New Jersey Statute (Title 2 A §23) and the Georgia URESA (Ga. Code Ann. Ch. 99-9A) were subject to a gender attack in that each provided only for the payment of alimony and Support only to the wife by the husband. No provision was made in either the New Jersey or Georgia Law for payment to the husband under any circumstances.

On December 28, 1978 the Superior Court of Gwinnett County entered an order requiring petitioner to pay the sum of $50.00 per week as alimony for the support of the former wife. A copy of the order overruling the Motion For New Trial is attached in the Appendix and was entered on March 25, 1979. The amendment to the Motion for New Trial raising the Constitutional issues is included in the Appendix hereto.

Review was obtained by Appeal to the Court of Appeals of Georgia and on October 11, 1979, the Court of Appeals denied relief in Case No. 58315, decided October 11, 1979. That case is reported in 151 Ga. 696. A copy of that opinion is included in the Appendix hereto.

A petition for contempt was filed on November 27, 1979, and a response was made, a copy of the response being included in the Appendix hereto. This response clearly raised the Federal Constitutional Grounds.

On February 27, 1980, the Gwinnett Superior Court entered its order finding Petitioner in wilfull contempt. A copy of the Order of Contempt is included in the Appendix. The appeal to the Supreme Court of Georgia resulted in the decision sought to be reviewed by this Petition for a Writ of Certiorari.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Conflicts With The Decision Of This Court In *Orr* v. *Orr*, 440 U.S. 268, 59 L E 2d 306; 99 S. Ct. 1102.

The decision below is in direct conflict with the *Orr* decision. Here as there, the issue of unlawful gender classification was raised in the contempt proceeding seeking to enforce the prior order of support for alimony only.

The date of the Order of Support and the order of March 26, 1979, is significant in that *Orr* was decided on March 5, 1979. The Amendment to the Motion for New Trial clearly raised the Federal Constitutional Issues and was filed prior to the order of March 26, 1979, and on March 12, 1979. The Court of Appeals of Georgia in its decision of October 11, 1979 (151 Ga. App. 696), in division 2 thereof held:

> "2. While Appellants Motion for New Trial was pending our Supreme Court pursuant to *Orr* v. *Orr* ____U.S.____, (99 SC 1102, 59 L E 2d 306) (1979), held our alimony statutes unconstitutional because they "impose alimony obligations on husbands but not wives and violate the Equal Protection Clause . . ." *Stitt* v. *Stitt*, 243 Ga. 301 (253 SE 2d 764) (1979). Appellant then amended his motion for new trial to make, for the first time, a constitutional attack upon URESA.
>
> That unfortunately for Appellant, was too late. "The constitutionalety of no law can be drawn in question for the first time in a Motion For New Trial. . ." *E. P.* v. *State*, 230 Ga. 770 (100 SE 2d 313) (1973), and "[T]he fact that the alimony laws were declared unconstitutional pending his appeal, ORR V. ORR, supra, *Stitt* v. *Stitt*, supra, does not require a different result. "*Kosikowski* v. *Kosikowski*, 243 Ga. 413 (254 SE 2d 363) (1979); followed in *Kirkpatrick* v. *Woodruff*, 243 Ga. 736 (256 SE 2d 465) (1979) (Contempt proceedings)."

It should be rembered that at the time of the divorce decree in New Jersey that the New Jersey Statute, supra, only provided for alimony to the wife and was subject to the same attack as made in *Orr* and *Stitt* v. *Stitt,* supra.

At the time of the entry of the Order of Support under the Georgia URESA (Ga. Code Ann. §99-903 a (6) (a) only placed a duty of support upon a husband. This was amended by Ga. Laws 1979 page 466, 495, effective April 4, 1979 and Ga. Laws 1979 p. 938, 940, effective April 13, 1979, so as to remove the impermissive gender classification. *No* order of support has been entered *after* the 1979 Amendments.

The Supreme Court of Georgia in *Kirkpatrick* v. *Woodruff,* 243 Ga. 736 (256 SE 2d 465) (1979) has compounded the conflict between the Georgia decisions and *Orr,* supra, by holding at page 737;

> "-In *Kosikowski* v. *Kosikowski,* 243 Ga. 413 (254 SE 2d 363) (1979) we held that a failure to challenge the constitutionality of our alimony laws at trial is a waiver and precludes any attempt to thereafter raise the issue on appeal. In line with *Kosikowski,* we now hold that questions concerning the constitutionality of our alimony laws cannot be raised in contempt proceedings if such issues were not timely and properly raised at trial".

This Court, in *Orr,* held the challenged statutes unconstitutional and reversed the lower court decision. Here, upon facts identical except that state action under URESA is even more subject to the attack. Reconciling the ORR V. ORR rule with the Georgia Decisions is impossible.

As stated in the Syllabus by the Reporter of Decisions in *Orr* at 59 L E 2d; 312 stated:

> "—At the hearing on the petition "appellant, though not claiming that he was entitled to an alimony award from Appelle, made the contention (advanced for the first in

> that proceeding) that the Alabama statutes by virtue of their reliance on a gender-based classification violated the Equal Protection Clause of the Fourteenth Amendment."

In the case here, some question might have been presented upon appeal or application for review of the Court of Appeals decision because of the possible procedural attack being raised by the amendment to the Motion For New Trial and not being timely made. However, the attack was made timely in the contempt proceeding as shown by the Four defenses raised by the petitioner as to the reasons why he should not be held in contempt. These Federal constitutional issues were considered and decided adversly and the lower court held and the Georgia Supreme Court agreed, that under no circumstances could the petitioner avail himself of the federal constitutional issues in a contempt proceeding. This is directly contrary to the *Orr* decision.

Also of interest in this case is that the order of support bears the lower court number designation of Case No. 78-A-1156. The contempt proceeding (copy of Rule for Contempt and Rule Nisi Order attached in Appendix) bears the number designation of 79-A-2533, a separate and distinct proceeding requiring and having new service. The response and defenses were "timely and properly raised "to meet the *Kilpatrick,* supra, test prescribed by the Supreme Court of Georgia.

2. The Decision Below Raises Substantial And Significant Issues Concerning Efforts To Raise And Rely Upon Federal Constitutional Issues.

The opinion of the Supreme Court of Georgia below in effect says that only those cases tried after the March 5, 1979 decision of this Court in *Orr* and in which the issue of alimony is contested on the federal constitutional issues timely and properly raised and decided will a party be allowed to question the statute. No contempt defenses, however timely or properly raised, will be considered. *Kosikowski,* supra. To state the issue or

questions is to answer the same in that substantial federal constitutional issues cannot be lightly disposed of in such an arbitrary manner. Certainly, in a new proceeding, all issues, defenses and reasons why the relief sought to be enforced against a party is the subject of legitimate inquiry by the court having jurisdiction. No question can be raised as to the standing of a party to use any defense available, including those of the United States Constitution. These are basic and inalienable rights.

> "—The holdings of the Alabama courts stand as a total bar to Appellant's relief; his constitutional attach holds the only promise of escape from the burden that derives from the challenged statute. —"

Clearly such substantila federal issues should not be denied or relegated to procedural niceties as to make a mockery of the application of such basic constitutional rights.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and decision of the Supreme Court of Georgia.

Respectfully submitted,

G. HUGHEL HARRISON
151 Pike Streeet
Lawrenceville, Georgia 30246
Counsel for Petitioner

In The Supreme Court
Of The United States

Rudolph Konscol,
Petitioner,

v.

The State Of Georgia Ex Rel Frances Konscol,
Respondent,

Certificate Of Service

I hereby certify that on this 4th day of August, 1980, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid to William Bryant Huff, District Attorney, Gwinnett Judicial Circuit, P.O. Box 568, Lawrenceville, Georgia, 30246, and to Arthur K. Bolton, Attorney General of the State of Georgia, 132 State Judicial Bldg, Atlanta, Ga. 30334, Cousel for the Respondent. I further certify that all parties required to be served have been served.

G. HUGHEL HARRISON
151 Pike Street
Lawrenceville, Georgia 30246
Counsel for Petitioner

APPENDIX

APPENDIX A

36361. Rudolph Konscol v. State of Georgia, Ex Rel Frances Konscol

ORDER

This is an appeal from an order of the trial court dated and entered February 27, 1980, finding and holding the respondent Rudolph Konscol in contempt of court for nonpayment of alimony for the support of the petitioner Frances Konscol. No application having been filed pursuant to Ga. L. 1979, p. 619 (Code Ann. §6-701.1) the appeal is subject to being dismissed. The constitutional challenges, complaining of gender-based classifications in the New Jersey alimony laws upon which the divorce and alimony decree was based, come too late and would not have been considered had an application been filed. *Kirkpatrick* v. *Woodruff,* 243 Ga. 736 (256 SE2d 465) (1979).

Appeal dismissed. All the Justices concur.

APPENDIX B

In The Superior Court Of Gwinnett County
State Of Georgia

Frances Konscol,
Plaintiff,
v.
Rudolph Konscol,
Defendant

Civil Action No. 78-A-1156

ORDER

An action under the Uniform Reciprocal Enforcement of Support Act was filed by Frances Konscol, as Plaintiff, against Rudolph Konscol, as Defendant, on June 28, 1978, seeking alimony for support of the Plaintiff as provided in a final judgment of divorce dated June 26, 1974, in Case No. M-1200-73, Superior Court of New Jersey, Chancery Division, Union County. The Defendant, Rudolph Konscol, filed an answer and response to said action in which it was alleged that the Plaintiff was not entitled to support under the provisions of the Uniform Reciprocal Enforcement of Support Act. There were no constitutional issues raised by the pleadings and upon the trial of the case, there were no constitutional issues raised by objections to the evidence or in any other appropriate manner.

On December 28, 1978, this Court entered an order which required the Defendant to pay to the Plaintiff through the Somerset County Probation Department the sum of $50.00 per week as alimony for the support of the Plaintiff.

On January 29, 1979, the Defendant filed his Motion for New Trial on general grounds with one specific ground that the Uniform Reciprocal Enforcement of Support Act does not authorize the enforcement of an award for alimony. The Defen-

dant filed an amendment to his Motion for New Trial on March 12, 1979, in which he raised for the first time the issues concerning the constitutionality of the Uniform Reciprocal Enforcement of Support Act, in that he has alleged that said act in relating to enforcement of alimony by the wife is discriminatory and does not provide equal protection under the United States Constitution and the Constitution of the State of Georgia.

The constitutionality of a law can not be drawn in question for the first time in a Motion for New Trial where the question was not raised in the pleadings by objection to the evidence or in some other appropriate way pending the trial of the case. See *E. P., et al.,* v. *State of Georgia,* 230 Ga. 770 (1973); *Perkins, et al.,* v. *Hattiesburg Brick Work, et al.,* 212 Ga. 804 (1957).

The Defendant's Motion for New Trial is hereby denied.

IT IS SO ORDERED this 26th day of March, 1979.

/s/ HOMER M. STARK, Judge
Gwinnett Superior Court

APPENDIX C

In the Superior Court of Gwinnett County
State of Georgia

Frances Konscol,
Plaintiff,
v.
Rudolph Konscol,
Defendant.
} Civil Action No. 78-A-1156

AMENDMENT TO MOTION FOR NEW TRIAL

Comes now Respondent, RUDOLPH KONSCOL, and files this his Amendment to his Motion for New Trial and for additional grounds therefor says:

1.

The Uniform Reciprocal Enforcement of Support Act (Ga. Laws 1958, p. 34), as amended by Ga. Laws 1977 p. 699, (Ga. Code Ann. Chapter 99-9a) and specifically so much thereof as set forth in Section 2(6)(a), (Ga. Code Ann. § 99-903(6)(a) is null and void on its face and in its application insofar as the same applies to the duty of support of a husband or ex-husband to a wife or ex-wife in that the same is discriminatory and a denial of equal protection as secured by the Constitution of the United States and the Constitution of the State of Georgia.

2.

The Uniform Reciprocal Enforcement of Support Act (URESA) in its entirety and insofar as the same applies to the enforcement of the payment of alimony by a husband or ex-husband to a wife or ex-wife is null and void on its face and in its application, in that the Act only provides for relief to the wife without any provision for relief to a husband and is dis-

criminatory and a denial of equal protection to the husband is contrary to the Constitution of the United States and the Constitution of the State of Georgia.

3.

In the case before the Court, the "support" sought to be enforced is the alimony provided in a New Jersey Divorce Decree that has been construed by this Court to be "support" within the definition of the "Duty of Support" as provided in Ga. Code Ann. § 99-903(a)(6) and such duty of support and its enforcement is null and void and contrary to the Constitution of the U.S. and the State of Georgia.

WHEREFORE, Respondent prays that these his additional grounds for New Trial be inquired into and that a New Trial be granted and the proceeding against this Respondent be dismissed.

Respectfully submitted,

/s/ G. HUGHEL HARRISON

Georgia, Gwinnett County

This is to certify that I have served a copy of the within and foregoing Amendment to Motion for New Trial upon the Plaintiff by handing a copy of the same to Mr. Bryant Huff, District Attorney, Gwinnett Judicial Circuit, in Lawrenceville, Georgia.

This 12th day of March, 1979.

/s/ G. HUGHEL HARRISON

Post Office Box 88
Lawrenceville, Georgia 30246
Phone 404-963-3421

APPENDIX D

58315. Konscol v. Konscol U-152

UNDERWOOD, Judge

This is an appeal from an order of support entered against appellant pursuant to the Uniform Reciprocal Enforcement of Support Act (URESA), Code Ann. Ch. 99-9A. We affirm.

1. Appellant, apparently referring to Code Ann. § 30-220 providing for revision of judgments for permanent alimony, asserts that an URESA action cannot be used to revise a foreign alimony decree within two years of a prior revision. However, that section provides that "[n]o petition [for revision] may be filed by either former spouse *under this law* [Code Ann. §§ 30-220 through 30.225.1] within a period of two years from the date of the filing of a previous petition by the same former spouse." (Emphasis supplied). While it was held in *Lamb* v. *Lamb,* 241 Ga. 545 (246 SE2d 665) (1978) that a petition for revision could not be brought pursuant to Code Ann. § 30-220, et. seq., within two years of a prior URESA action which had sought the same relief, the converse does not hold true since § 30-220, by its terms, imposes no limitation upon the bringing of subsequent URESA actions.

In any event appellant fails to show by the record any prior revision of the foreign judgment, and "[t]his court can not consider factual representations in the appellant's brief which do not appear on record." *Coweta Bonding Co.* v. *Carter,* 230 Ga. 585, 586 (1) (198 SE2d 281) (1973). Accord: *Redwing Carriers, Inc.* v. *Knight,* 143 Ga. App. 668, 674 (239 SE2d 686) (1977). Accordingly no reversible error appears.

2. While appellant's motion for new trial was pending our Supreme Court, pursuant to Orr v. Orr, U.S. (99 SC 1102, 59 LE2d 306) (1979), held our alimony statutes unconstitutional because they "impose alimony obligations on husbands but not

wives and violate the Equal Protection Clause . . ." *Stitt* v. *Stitt,* 243 Ga. 301 (253 SE2d 764) (1979). Appellant then amended his motion for new trial to make, for the first time, a constitutional attack upon URESA.

That, unfortunately for appellant, was too late. "'The constitutionality of no law can be drawn in question for the first time in a motion for new trial . . .'" *E. P.* v. *State,* 230 Ga. 770 (199 SE2d 313) (1973), and "[t]he fact that the alimony laws were declared unconstitutional pending his appeal, Orr v. Orr, supra, *Stitt* v. *Stitt,* supra, does not require a different result." *Kosikowski* v. *Kosikowski,* 243 Ga. 413 (254 SE2d 363) (1979); followed in *Kirkpatrick* v. *Kirkpatrick,* 243 Ga. 736 (256 SE2d 465) (1979) (contempt proceedings).

Judgment affirmed. McMurray, P. J. and Banke, J., concur.

APPENDIX E

In The Superior Court
Gwinnett County, Georgia

The State of Georgia
ex rel.
Frances Konscol,
Petitioner,

vs.

Rudolph Konscol,
Respondent.

Civil Action No. 79-A-2533

284 Dillard Ct.
Lilburn, Georgia

RULE FOR CONTEMPT

Comes now the State of Georgia by and through the District Attorney of the Gwinnett Judicial Circuit, on behalf of the above named PETITIONER and files this rule for contempt against RUDOLPH KONSCOL.

1.

Your PETITIONER shows that on the 28th day of December 1978, the RESPONDENT was summoned into Court to show cause why an Order should not issue requiring the said RESPONDENT to support his minor child(ren) as required by law, at which time the Court ordered that the RESPONDENT pay to the (Adult Probation Office) the sum of $50.00 per week.

2.

Your PETITIONER shows that the RESPONDENT has not complied with the Order issued by the Honorable Homer M. Stark Superior Court Judge, Gwinnett Judicial Circuit, and that

on the 30th day of November, 1979, RESPONDENT was in arrears in his payments amounting to $2,200.00.

3.

Your PETITIONER shows that the RESPONDENT has failed and refused to pay in accordance with said Order and is now in contempt of said Court, and PETITIONER asks that the RESPONDENT be held in contempt of Court for failure to abide the ORDER of this Court.

WHEREFORE, PETITIONER prays that RESPONDENT be adjudged in contempt of this Honorable Court and be required to pay immediately the sum of $2,200.00 or be incarcerated in the Common Jail of Gwinnett County for failing to obey the judgment of this Court.

/s/ W. B. HUFF
FOR THE PETITIONER

* * * *

ORDER

The above and foregoing Petition for Contempt having been presented, it is considered, allowed and ordered filed.

Let the RESPONDENT, Rudolph Konscol, show cause before the Judge of the Superior Court of Gwinnett County on the 24th day of January, 1980, at 2:00 o'clock P.M. on said day in 105 Room of the Gwinnett County Courthouse, why the prayers of PETITIONER'S Rule for Contempt should not be granted, and why he should not be incarcerated in the Common Jail of Gwinnett County as prayed for Contempt of Court.

Let a copy of the within Order and Petition for Contempt be served upon the Defendant.

It is so ordered.

This 27th day of November, 1979.

/s/ H. M. STARK
Judge of Superior Court
Gwinnett Judicial Circuit

APPENDIX F

In the Superior Court of Gwinnett County
State of Georgia

The State of Georgia, ex. rel. Frances Konscol, Petitioner, vs. Rudolph Konscol, Respondent.	Civil Action File No. 79-A-2533

RESPONSE TO ATTACHMENT FOR CONTEMPT

Comes now the respondent and files this his response and defenses and in support thereof shows:

First Defense

The Order of Support is null and void in that the judgment and decree of the State of New Jersey in case no. M-1200-73, between the parties hereto, was null and void in that the laws of the State of New Jersey of force and effect at the time of the entering of the decree provided only for the granting or awarding alimony to the wife.

New Jersey Revised Statutes Title 2A §23

83 N.J. Super. 159

Orr v. Orr, ____ U.S. ____; 59 L. Ed. 2d 306

99 S.Ct. 1102;

Stitt v. *Stitt*, 243 Ga. 301

Second Defense

The Divorce decree and the order of the New Jersey decree imposing the obligation to pay alimony upon the respondent

herein was null and void in that the statute imposed alimony obligations on husbands but not wives and violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

Orr v. *Orr*, ____ U.S. ____; 99 SC 1102, 59 L. Ed 2d 306

Third Defense

The Order of Support entered in this case on December 28, 1978, recites upon its face that the payments are for alimony and that the support awarded therein is to enforce and give effect to the divorce decree of New Jersey in that there is no duty to Support under the Georgia URESA except the obligation imposed by the New Jersey divorce decree and that the New Jersey obligation is null and void.

Fourth Defense

The New Jersey alimony statute and the Georgia URESA Act, in effect at the time of the entry of both the divorce decree and the order of support were null and void and in violation of the Equal Protection Clause of the Fourteenth amendment to the United States Constitution because of the gender classification.

For further answer and by way of counterclaim this respondent shows that the judgment of support should be modified and vacated and declared of no force and effect and that respondent should be discharged, and for such other and further relief as the court deems proper.

/s/ G. HUGHEL HARRISON
Attorney for Respondent

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Lawrenceville, Georgia 30246
Phone/ 404 963-3421

APPENDIX G

In The Superior Court Of Gwinnett County
State Of Georgia

The State Of Georgia, ex rel Frances Konscol, Petitioner, v. Rudolph Konscol, Respondent	Civil Action No. 79-A-2533

ORDER

The above-styled action came on for a hearing before this Court, and it was stipulated by the parties in open court that the Respondent is in arrears in the payment of alimony for the support of the Petitioner in the sum of $2,600.00, being the amount of support having accrued since the December 28, 1978, order which required payments to be made at the rate of $50.00 per week commencing February 1, 1979.

The Respondent presented no evidence to explain his failure to pay the support payments or to indicate any inability on his part to pay said payments.

The Respondent in this contempt action has attempted to assert that the alimony statutes of New Jersey are unconstitutional. In the case of *Kirkpatrick* v. *Woodruff*, 243 Ga. 736, the Court held that questions concerning the constitutionality of alimony laws cannot be raised in contempt proceedings if such issues were not timely and properly raised at the trial.

There was no evidence introduced establishing that the constitutionality of the New Jersey statutes was raised at the time the alimony award was made on June 26, 1974, in the case of *Konscol* v. *Konscol*, Case No. M-1200-73, Superior Court of New Jersey, Chancery Division, Union County.

WHEREFORE, this Court finds the Respondent to be in wilful contempt for failure to comply with an order of this Court entered December 28, 1978, requiring the Respondent to pay to the Petitioner through the Somerset County Probation Department the sum of $50.00 per week for the support of the Petitioner, being in arrears in the sum of $2,600.00 as of January 24, 1980. The Respondent may purge himself of this contempt by the payment of the sum of $1,300.00 on or before June 1, 1980, and by payment of the balance thereof in the amount of $1,300.00 on or before September 1, 1980. In addition to the payment of said arrearage, Respondent shall be required to pay the weekly payments of $50.00 each as previously ordered by this Court.

IT IS SO ORDERED this 27th day of February, 1980.

/s/ HOMER M. STARK, Judge
Gwinett Superior Court

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

NO. 80-188

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OCTOBER TERM, 1979

RUDOLPH KONSCOL,

Petitioner,

VS.

THE STATE OF GEORGIA EX REL
FRANCES KONSCOL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

BRYANT HUFF
District Attorney
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Counsel for Respondent

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Turner v. Harper, 234 Ga. 891 (218 SE 2d 621) (1975)..... 5

Treatises:

C. Wright, Federal Courts 541-542 (3d Ed, 1976)..... 3

Statutes:

Ga. L. 1979, p. 619 (Code Ann. § 6-701.1)..... 3

NO. 80-188

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

RUDOLPH KONSCOL,

Petitioner,

VS.

THE STATE OF GEORGIA EX REL
FRANCES KONSCOL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

QUESTIONS PRESENTED

No question is properly presented for consideration in this Court, since none of the questions asserted by the petitioner were properly raised in the State Courts.

STATEMENT OF THE CASE

An action under the Uniform Reciprocal Enforcement of Support Act was filed by Frances Konscol, as Plaintiff, against Rudolph Konscol, as Defendant, on June 23, 1978, seeking alimony for support of the Plaintiff as provided in a final judgment of divorce dated June 26, 1974, in Case No. M-1200-73, Superior Court of New Jersey, Chancery Division, Union County. The Defendant, Rudolph Konscol, filed an answer and response to said action, in which it was alleged that the Plaintiff was not entitled

to support under the provisions of the Uniform Reciprocal Enforcement of Support Act. There were no constitutional issues raised by the pleadings, and upon the trial of the case, there were no constitutional issues raised by objections to the evidence or in any other appropriate manner. This is set forth in the Order of March 26, 1979, attached to Petitioner's Petition for a Writ of Certiorari to the Supreme Court of the State of Georgia (hereinafter referred to as Petitioner's Appendix) as Appendix B, and the Petitioner has not disputed this fact.

Petitioner attempted to raise the constitutional issue for the first time in his Amendment to the Motion for New Trial, Petitioner's Appendix C. The Superior Court of Gwinnett County did not pass on the constitutional issue, since it was not raised at trial. See the Order of March 26, 1979, Petitioner's Appendix B. The Georgia Court of Appeals reviewed the case and affirmed the trial court because Petitioner's constitutional challenge was not timely made. See Petitioner's Appendix D. The Petitioner did not appeal the decision of the Court of Appeals of Georgia, and after it became final, it was made the judgment of the Superior Court of Gwinnett County on October 31, 1979. See Respondent's Appendix A.

A petition for contempt was filed November 27, 1979, and Petitioner again attempted to raise the constitutional issue. See Petitioner's Appendix F. Petitioner's only defense to the contempt action was the constitutionality of laws not properly raised at trial, the very issue which had just been decided by the Court of Appeals of the State of Georgia without appeal by the Petitioner from that decision. Therefore, the Superior Court of Gwinnett County adjudged Petitioner to be in contempt. See Petitioner's Appendix G. Petitioner appealed the ad-

judication of contempt to the Supreme Court of Georgia, which dismissed the appeal pursuant to Ga. L. 1979, p. 619 (Code Ann. § 6-701.1), since the issue had been decided by the Court of Appeals and allowed to become final without appeal by Petitioner. The Supreme Court of Georgia did in dicta note that the constitutional challenge was not timely made and would not have been considered had a timely appeal been filed. See Petitioner's Appendix A.

REASONS THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED

1. THE CONSTITUTIONAL ISSUES ASSERTED BY PETITIONER WERE NOT PROPERLY AND TIMELY RAISED IN THE STATE COURTS AND THIS COURT HAS NO JURISDICTION.

It is not disputed that Petitioner first attempted to raise the constitutional issues after the trial of the case in an Amendment to his Motion for New Trial. It is a clear and established rule of procedure in Georgia that the constitutionality of a law cannot be drawn into question for the first time in a Motion for New Trial where the question was not raised in the pleadings, by objection to the evidence, or in some other appropriate way pending the trial of the case. *E. P. v. State*, 230 Ga. 770 (199 S.E.2d 313) (1973); *Moore v. State*, 194 Ga. 672 (22 S.E.2d 510) (1942); *Hendry v. State*, 147 Ga. 260 (93 S.E. 413) (1917). Failure to raise the questions in a proper and timely manner at the trial as required by State law precludes review by this Court. See C. Wright, Federal Courts 541-542 (3d ed, 1976). In *Orr v. Orr*, 440 U.S. 268 (59 L.Ed. 2d 306, 99 S. Ct. 1102) (1979) at p. 274, this Court noted this jurisdictional question and in footnote 4, this Court stated,

> "This does not preclude any other State, or even Alabama in another case, from holding that contempt proceedings are too late in the process to challenge the constitutionality of a divorce decree already entered without constitutional objection – assuming, of course, that the State's prior proceedings permit fair opportunity to assert the federal right, see NAACP v. Alabama, 377 U.S. 288 (12 L.Ed.2d 325, 84 S. Ct. 1302) (1964). Indeed, as our Brother Powell points out, post at 286, 59 L.Ed.2d at 324, Alabama apparently has a similar rule. See Hughes v. Hughes, 362 So.2d 910 (Ala Civ App), cert dismissed as improvidently granted, 362 So.2d 918 (Ala 1978), appeal docketed, No. 78-1071. There is, therefore, no reason for concern that today's decision might nullify existing alimony obligations. . ."

The Supreme Court of Georgia has held that, "[t]he fact that the alimony laws were declared unconstitutional pending his appeal (cits. omitted), does not require a different result." *Kosikowski v. Kosikowski*, 243 Ga. 413 (254 S.E.2d 363) (1979); *Kirkpatrick v. Kirkpatrick*, 243 Ga. 736 (256 S.E.2d 465) (1979) (contempt proceedings).

2. THE PETITIONER IS BARRED FROM ASSERTING AN ISSUE PREVIOUSLY DECIDED ADVERSELY BY THE DOCTRINE OF RES JUDICATA.

The Court of Appeals of Georgia decided that the constitutional challenges by petitioner were not timely and properly made. *Konscol v. Konscol*, 151 Ga. App. 696 (261 S.E.2d 438) (1979). Petitioner allowed the decision to become final and did not appeal from it. The remittitur was entered in the trial court as shown in Respondent's Appendix A. The ruling of the Court of Appeals of Georgia became the law of the case and the same question could not be raised in the contempt proceeding to en-

force an order entered after the original trial. *Turner v. Harper*, 234 Ga. 891 (218 S.E.2d 621) (1975); *R.O.A. Motors, Inc. v. Taylor*, 220 Ga. 122 (137 S.E.2d 459) (1964). In *Perry v. McClendon*, 62 Ga. 598, 604 (1879), the Supreme Court of Georgia said, "No party, plaintiff or defendant, is permitted to stand his case before the Court on some of its legs, and if it falls, set it up again on the rest in a subsequent proceeding, and thus evade the bar of the former judgment . . . He must discharge all his weapons, and not reserve a part of them for use in a future encounter. He must realize that one defeat will not only terminate the campaign, but end the war."

Therefore, the final determination by the Court of Appeals of Georgia in *Konscol v. Konscol*, supra, of the same issue petitioner seeks to raise again is a bar to any further litigation. If this were not the rule, there could be endless litigation of the same issues and the Courts could be rendered powerless to finally resolve a case.

CONCLUSION

For the reasons set out above, the Respondent shows that the Petition for a Writ of Certiorari to the Supreme Court of Georgia should be denied.

Respectfully submitted,

BRYANT HUFF
P. O. Box 569
Lawrenceville, Georgia 30246
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of August, 1980, three copies of this Brief on Petition for a Writ of Certiorari were mailed, postage prepaid, to G. Hughel Harrison, Attorney at Law, Post Office Box 88, Lawrenceville, Georgia 30246, Counsel for the Petitioner, and to Arthur K. Bolton, Attorney General of the State of Georgia, 132 State Judicial Building, Atlanta, Georgia 30334. I further certify that all parties required to be served have been served.

BRYANT HUFF, District Attorney
Gwinnett Judicial Circuit
Post Office Box 569
Lawrenceville, Georgia 30246
Counsel for Respondent

APPENDIX

APPENDIX A

COURT OF APPEALS
OF THE STATE OF GEORGIA

ATLANTA, October 11, 1979

The Honorable Court of Appeals met pursuant to adjournment. The following judgment was rendered:

58315 RUDOLPH KONSCOL v. FRANCES KONSCOL

This case came before this court on appeal from the Superior Court of Gwinnett County; and, after argument had, it is considered and adjudged that the judgment of the court below be affirmed. McMurray, P.J., Banke and Underwood, JJ., concur.

FILED IN OFFICE
OCT 30 1979
/s/ O. MILLARD PEEVY
CLERK SUPERIOR COURT
GWINNETT COUNTY, GEORGIA

BILL OF COSTS, $30.00

COURT OF APPEALS OF THE
STATE OF GEORGIA

Clerk's Office, Atlanta, Oct. 29, 1979

I certify that the above is a true extract fr
minutes of the Court of Appeals of Georgia, and that G. Hill Harrison paid the above bill of costs.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/ MORGAN THOMAS, Clerk

JUDGMENT ON REMITTITUR

The within and foregoing case having been appealed to the Court of Appeals of the State of Georgia, and the judgment of this Court having been affirmed by said Court, the judgment of the Court of Appeals of the State of Georgia is hereby made the judgment of this Court.

SO ORDERED, this 31st day of October, 1979.

/s/ H. M. STARK

HOMER M. STARK, Judge
Gwinnett Superior Court